NO. 20728

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERNARD KAPLAN; ALBERTO BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MANUEL L. REAL,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
GERALD F. UELMEN,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
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I

JURISDICTIONAL STATEMENT

This is an appeal from convictions of uttering and possessing counterfeit obligations of the United States, in violation of Section 472, Title 18, United States Code. The appellants were convicted by the Court, after waiving their right to jury trial, on March 31, 1965, in the United States District Court for the Central Division of the Southern District of California, the Honorable William J. Lindberg, United States District Judge, presiding. Jurisdiction of the District Court was based upon Section 3231, Title 18, United States Code. Jurisdiction of this Court to entertain the appeal is derived from Sections 1291 and 1294, Title 28, United

States Code.

II

SPECIFICATION OF ERRORS

The following issues are raised in the argument presented in Appellants' Opening Brief:

1. Were the two appellants denied the effective assistance of counsel by their choice to proceed to trial with the same attorney in the face of a possible conflict of interests?

2. Did the examination by the court of statements producible under the Jencks Act, Section 3500, Title 18, United States Code, which statements were presented to defense counsel and the Court prior to a request by defense counsel for their production, unduly prejudice appellant's constitutional rights?

3. Did the Court err in denying appellant Kaplan's motion to suppress as evidence six counterfeit $100 federal reserve notes which were removed from the trunk of appellant's auto after it was seized by federal agents?

4. Could appellant Kaplan be found guilty under Count Three of the Indictment, which charged him as an aider and abettor, in the same trial in which the person indicted as the principal in Count Three was acquitted?

5. Did the Court err in denying the motion of appellants for production prior to trial of statements made by the appellants to federal agents?

6. Was appellant Kaplan denied due process of law by

the use in evidence of admissions made to federal agents before he was taken into custody and one day after he had been warned of his constitutional rights to remain silent, to have an attorney present, and that any of his statements could be used against him?

III

STATEMENT OF THE FACTS

On January 13, 1965, an indictment returned by the September, 1964 Grand Jury was filed in the United States District Court for the Southern District of California, Central Division, charging violations of Sections 2, 371 and 472 of Title 18, United States Code, by appellants Bernard Kaplan and Alberto Berumen. Specifically, Count One of the indictment charged these appellants, and one Ronald N. Reinhardtsen, conspired "to pass, utter, publish and to attempt to pass, utter and publish falsely made, forged, and counterfeited obligations of the United States". Count Two charged appellant Berumen with passing a counterfeit $100 federal reserve note on or about December 6, 1964. Count Three charged defendant Reinhardtsen with passing a counterfeit $100 federal reserve note on or about December 17, 1964, and that appellant Kaplan "aided, abetted, counseled, induced and procured the commission" of this offense. Count Four alleged that on or about December 19, 1964, appellant Berumen again passed a counterfeit $100 federal reserve note. Count Five charged that appellant Kaplan and defendant Reinhardtsen kept concealed in their

possession six counterfeit $100 federal reserve notes.

On January 25, 1965, appellants were arraigned before the Honorable Charles H. Carr, District Judge. At this time, Howard E. Beckler entered an appearance as retained counsel on behalf of both appellant Kaplan and appellant Berumen. Pleas were not taken until February 8, 1965, when appellant Kaplan entered a plea of Not Guilty to Counts One, Three and Five, and appellant Berumen pled Not Guilty to Counts One, Two and Four. The matter was then set for trial on March 29, 1965.

Pre-trial motions to suppress evidence, filed on behalf of defendant Reinhardtsen and later joined by appellant Kaplan [R. T. 15], and for discovery and inspection, filed on behalf of the appellants, came before the Honorable Jesse W. Curtis, District Judge, on March 15, 1965. Judge Curtis ordered the Motion to Suppress Evidence continued to time of trial, and, with the concurrence of the government, granted discovery by the appellants of all items requested except those enumerated in paragraphs 5 and 6 of the motion. The items denied were "the statements of each moving defendant herein respecting the subject matter of the instant case, whether the same be characterized as confessions, admissions, or otherwise", and "the statements of Defendant Ronald W. Reinhardtsen" (Motion for Discovery and Inspection, p. 4).

When the case was called for trial on March 29, 1965, government counsel announced ready, informing the Court that "seven out-of-state witnesses, some coming from a distance of

over 2,000 miles", were present [R. T. viii]. At this time, on behalf of appellant Kaplan, attorney Beckler requested a continuance, explaining that in a final interview with his clients two days before, he discovered "a definite conflict of interest between the two defendants" [R. T. viii, ix]. When asked how much time was necessary, appellant Kaplan responded:

> "I do need a little time for money. I would say a couple of weeks, for one reason. I had made financial arrangements with Mr. Beckler. Now I have money coming in in about, I would say, somewheres in about two or three weeks. I can't very well walk into an attorney's office without money and say, 'Good morning'." [R. T. x].

Government counsel objected strenuously, arguing that six of his witnesses would be greatly inconvenienced, and commenting:

> "There has been no indication to me until about five minutes before court started today that there was going to be a continuance asked for or a conflict. Back the end of January, the beginning of February, Mr. Beckler became the attorney for both Mr. Kaplan and Mr. Berumen. It seems strange to the government that the conflict didn't develop until this past Saturday." [R. T. xi].

At this point, the Court indicated its suspicion that the motion for continuance was a dilatory tactic:

"Well, the thing that casts a little shadow on this is it seems to me that I received word in the middle of the week that Mr. Kaplan was going to make a motion for a continuance based upon illness. . . . It seems to me that we have a disposition on the part of this defendant for a continuance on one ground or another." [R. T. xii].

After passing to other matters, the Court announced that a continuance of three days, to the following Thursday, was being granted [R. T. xiii]. This period was shortened to one day, at the request of Mr. Beckler, and on the basis of these assurances:

"MR. BECKLER: Your Honor, I can arrange for Mr. Kaplan to have competent prepared counsel and we can answer ready today. I will have somebody that I recommend highly to him answer ready. I will spend some time this afternoon and we can answer ready today unless the Court would entertain the motion to continue it until April 19th. This is my first available date. I was thinking that the interests of justice might better be served -- in fact, if at all possible if the witnesses of the government might return to their places and then come back and be assured that we would go to trial on April 19th. If not, rather than trail to Thursday because of the inconvenience to the government witnesses, I will have counsel here to represent Mr. Kaplan answer

ready today.

"THE COURT: Are you ready to go to trial then tomorrow morning?

"MR. BECKLER: Ready right now. Well, ready tomorrow morning. I'll call someone today and we will go over it tomorrow." [R. T. xiv, xv].

On the following morning, when Mr. Beckler appeared to represent both appellants, the Court was told that the conflict "was only limited to the possibility and contingency of a jury. . . . In short, there is no conflict" [R. T. 12-13]. The Court then inquired of both appellants, and both offered assurances that they had resolved any conflicts, and were "fully satisfied then to proceed in trial with Mr. Beckler" [R. T. 13, 14].

After the waiver of jury trial was consented to by each defendant, as well as all attorneys [R. T. 4-11], the government opened its case with testimony related to Count Two of the indictment, including a grocery clerk who identified appellant Berumen as the person who paid for a small order of groceries with a counterfeit $100 federal reserve note [R. T. 26]; the grocery manager who then took possession of the note and delivered it to a Secret Service Agent [R. T. 35, 36]; and the Secret Service Agent who took custody of the note [R. T. 40].

Proceeding to Count Three of the indictment, the government presented two employees of the G. R. Kirk Company, who identified appellant Kaplan and defendant Reinhardtsen as the men who came

to a wholesale Christmas tree lot, operated by the Kirk Co., on December 17, 1964, and paid for a purchase of Christmas trees with a counterfeit $100 federal reserve note [R. T. 45-46, 96-97]. A third Kirk employee testified that he took the note to a branch of United California Bank and deposited it [R. T. 84], and the bank teller [R. T. 121 ff.] and assistant cashier [R. T. 125 ff.] established the chain of custody until the note was recovered by a Secret Service Agent [R. T. 130-33].

In proving the fourth count of the indictment, the government called four witnesses: a grocery clerk who identified appellant Berumen as the man who, on December 19, 1964, paid for a small order of groceries with a counterfeit $100 federal reserve note [R. T. 133 ff.]; the assistant manager of the grocery who was asked to verify the bill [R. T. 143 ff.]; the manager of the store who detained appellant Berumen and called the Hollywood Police Department [R. T. 147 ff.]; and the police officer who responded to the call [R. T. 152-53].

When Secret Service Agent Robert L. Tomsic was called as a witness, the government counsel voluntarily presented defense counsel with copies of all statements of the witness producible under the Jencks Act, Section 3500, Title 18, United States Code [R. T. 154]. As acknowledged by defense counsel, this was done to save time [R. T. 155]. When counsel for defendant Reinhardtsen requested a recess to review these documents, the Court asked to see a copy in order to determine how long a recess would be necessary for defense counsel to study the statements [R. T. 156].

After a brief recess, Agent Tomsic was recalled to the stand, at which time both defense counsel objected to the fact that copies of the Jencks statements had been presented to the Court [R. T. 159-61]. In response to this inquiry, government counsel explained:

> "Your honor, if I may interject one thing: Not only are the documents handed to the court for the purposes of seeing whether they should be turned over to defense counsel, but they also have to be previewed by the court in order to find out which witness the document is a statement about. In other words, the Jencks Act doesn't cover all things said about all people. At the same time I handed both defense counsel a copy, at the request of the court I handed the court a copy of the documents." [R. T. 161].

The counsel for appellants Kaplan and Berumen then responded:

> "I can't very well move to strike the court's reading of these certainly, so at this time, I will just sit down." [R. T. 162].

The statements were subsequently used by both defense counsel for purposes of cross-examining Agent Tomsic [R. T. 254, 260], and defense counsel also used statements in the report to support his arguments to the Court on the motion to suppress [R. T. 218]. At no time were any of these statements or reports offered in evidence.

The government then proceeded to direct examination of Agent Tomsic, at first limiting his testimony to that relevant to the

Motion to Suppress Evidence [R. T. 159]. Agent Tomsic testified that in the course of his duties as a Secret Service Agent, he received a typewritten note, dated December 18, 1964, which related that a counterfeit note had been passed by a Mr. Brumer at the Kirk Company, and that "Mr. Brumer was driving a white '63 or '64 Chevrolet with Ohio license plates, left front fender wrecked" [R. T. 163]. On the following day, Agent Tomsic went to the Hollywood Police Station, and took appellant Berumen into custody [R. T. 165]. He took Mr. Berumen with him to the G. R. Kirk Co. lot [R. T. 170], and on the way they discussed Mr. Berumen's connection with defendant Reinhardtsen, and made an effort to locate Mr. Reinhardtsen [R. T. 169, 198-199]. Upon arriving, Agent Tomsic was told that the man who passed a counterfeit $100 bill there had just gotten into his car to leave [R. T. 170]. Agent Tomsic testified that he immediately went out, and saw defendant Reinhardtsen sitting in the front seat of a 1963 white Chevrolet, with a dented left fender [R. T. 171]. The agent then arrested Mr. Reinhardtsen who, after being advised of his rights, acknowledged that he and appellant Kaplan had given the $100 note to the Kirk Co., and stated that the car belonged to Mr. Kaplan, who had been driving the day the $100 note was passed at Kirk Co. [R. T. 173]. Agent Tomsic then told Mr. Reinhardtsen the car "was going to be seized as the car had been used to carry a $100 counterfeit note" [R. T. 174]. The car was secured and left at the Kirk Co. lot with permission of its employees. The same day, it was retrieved by two other Secret Service Agents and brought to the garage of the

Federal Building [R. T. 174-75]. The following day, December 20, 1964, Agent Tomsic went to the garage and, in a search of the trunk, discovered six counterfeit $100 federal reserve notes in an envelope contained in a box [R. T. 179]. After full argument [R. T. 204-223], the court denied the defense motion to suppress these notes as evidence [R. T. 224].

Agent Tomsic then testified relevant to the case in chief, repeating his testimony as to the discovery of the six counterfeit notes in the trunk of appellant Kaplan's automobile. He further testified that after seizing the car, he had proceeded to the Christmas tree lot operated by the appellants, where he spoke to appellant Kaplan [R. T. 238]. At this time, appellant Kaplan was advised "that he didn't have to make any statements, that any statements he made could be used against him in court, and he was entitled to have an attorney" [R. T. 239]. Appellant Kaplan admitted accompanying defendant Reinhardtsen to the Kirk Co. lot on December 17, 1964 [R. T. 239]. Appellant Kaplan was not arrested at this time, but on the following day he came to the Federal Building to get a trailer hitch off of the seized automobile. As Agent Tomsic testified, at this time Mr. Kaplan admitted that all of the boxes and papers in the car were his, and while Agent Tomsic pretended not to be looking, appellant Kaplan felt through the box in which the counterfeit notes had been found [R. T. 241-42].

The government then presented two witnesses from Chicago, Illinois, who identified appellant Kaplan as the man who, in November of 1964, paid a bill in a Chicago restaurant with a counterfeit

$100 federal reserve note [R. T. 218 ff., 287 ff.]. The restaurant owner testified further that appellant Kaplan subsequently telephoned him twice: once to arrange reimbursement [R. T. 298]; and once to ask that he not identify the appellant if shown his picture by Federal Agents [R. T. 300].

After all of the federal reserve notes involved in the case were identified as counterfeit by a Secret Service Agent conceded by the defense to be an expert [R. T. 315], they were offered into evidence and the government rested its case [R. T. 318-19].

Appellants Berumen and Kaplan then rested without presenting any defense [R. T. 322]. On behalf of defendant Reinhardtsen, only one witness was presented, an associate of his defense attorney, who testified as to the accuracy of an address given by Mr. Reinhardtsen to the Kirk Co. [R. T. 325-26], and that Reinhardtsen regularly used three different names in the course of his business [R. T. 324].

At the time of closing arguments, the government conceded that evidence was insufficient to convict the defendants of conspiracy under Count One, as well as to show possession by defendant Reinhardtsen under Count Five [R. T. 331]. After full argument of counsel, the Court summarized its findings as follows:

> "I find Mr. Kaplan guilty as to 3 and 5. I find Mr. Berumen guilty as to Counts 2 and 4. With strong suspicions of guilt, I find the defendant Reinhardtsen not guilty as to Counts 3 and 5, and all the defendants not guilty as to Count 1." [R. T. 372].

On April 13, 1965, the Court sentenced appellant Kaplan to a term of three years each on Counts Three and Five, to run concurrently under 18 U.S.C. Section 4208(a)(2), and appellant Berumen to a term of three years each on Counts Two and Four, also to run concurrently.

IV

ARGUMENT

A. APPELLANTS WERE NOT DEPRIVED OF THE "ASSISTANCE OF COUNSEL" BY THEIR RETENTION OF THE SAME ATTORNEY, DESPITE A CONFLICT IN THEIR RESPECTIVE INTERESTS.

In urging that they were deprived of the assistance of counsel, although they do not clearly state so, the appellants are not citing any error on the part of the Court below. Nor could they do so: the Court made every effort to protect the rights of the appellants. When Mr. Beckler, representing both appellants, stated on the day set for trial that he had discovered a conflict of interest between the two defendants, the Court offered to continue the matter for three days, to allow separate counsel to be arranged for Mr. Kaplan, despite the inconvenience to seven government witnesses from out-of-state [R. T. x, xiii]. Mr. Beckler represented that competent prepared counsel could be arranged that very day [R. T. xiv], so the matter was continued one day. On the following day, when Mr. Beckler appeared to represent both appellants, and announced that,

because a jury trial had been waived, the conflict no longer existed [R. T. 13], the Court went to great lengths to ensure that both appellants were willing to proceed with Mr. Beckler as their attorney:

"THE COURT: Very well, I will inquire of Mr. Kaplan, are you aware of that position?

"MR. KAPLAN: Yes, your Honor.

"THE COURT: That might have been of some moment in the event of a jury trial, and you have discussed that fully?

"MR. KAPLAN: Yes, we have resolved anything that might have come up.

"THE COURT: Do you feel you have been fully advised as to all matters and you are fully satisfied then to proceed in trial with Mr. Beckler?

"MR. KAPLAN: Yes, I sure have.

"THE COURT: Mr. Berumen, I would like to ask the same thing of you. You understood this?

"MR. BERUMEN: Yes, we talked it out and it is all straightened out.

"THE COURT: You think now that without a jury trial there would be no occasion for any conflict or any conflict of any moment?

"MR. BERUMEN: That is right.

"THE COURT: And you are quite willing at this time to proceed in trial, represented by Mr.

Beckler, having in mind that he also represents Mr. Kaplan?

"MR. BERUMEN: Yes, sir." [R. T. 13-14].

It is readily apparent that the Court did everything in its power to ensure that appellants were represented by counsel of their choice. Nevertheless, appellants now urge that the conflict was not reconciled, arguing that Attorney Beckler's representation to the Court "may well have been more influenced by his inability to procure other counsel and commitment to other clients, than by sound reasoning and judgment" [Opening Brief of Appellants, p. 25].

It is the position of the appellee that, even if a conflict did in fact exist, the appellants waived their right to be represented by separate counsel; moreover, neither appellant suffered any prejudice in the course of their representation by Mr. Beckler. Although for the sake of subsequent argument the existence of a conflict will be conceded, it must be recognized at the outset that there is no showing in the record as to what the conflicting interests were, and what effect the waiver of a jury trial had upon the possibility of conflict. As stated by the appellants, "Attorney Beckler was, of course, the only person in a position to make such determination, since he had the benefit of privileged disclosure by his clients to him" [Opening Brief of Appellants, p. 20]. Appellants inconsistently ask this Court, on the one hand, to engage in conjecture and accept the conclusion of Attorney Beckler that a conflict existed, while at the same time attacking the good faith and sound judgment of this very same attorney in concluding that the conflict

had been resolved.

Even if a conflict did exist, and continued to exist after jury trial had been waived, reversible error would not result from Attorney Beckler's continued representation of both appellants if both were aware of the conflict and consented. There is no legal or ethical prohibition of a lawyer representing conflicting interests, as long as there is full disclosure of the facts to the clients. See Canon 6, American Bar Association, Canons of Professional Ethics. Appellants rely upon the case of Glasser v. United States, 315 U.S. 60 (1942) to give constitutional proportion to their argument. Glasser, however, involved direct participation by the Court, in appointing the same lawyer to represent two defendants with conflicting interests. Here, the appellants retained Mr. Beckler, and both expressed a desire for him to continue representing them after being "fully advised as to all matters" [R. T. 13]. As stated by the Supreme Court in the term following the Glasser decision:

> "The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive his Constitutional right to assistance of counsel.
>
> " . . . the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open."

Adams v. United States ex rel McCann,

317 U.S. 269, 275, 279 (1942).

Appellants intimate that their waiver of the right to separate counsel in open court was not an "intelligent, confident waiver" because they had no legal training, and relief solely upon Attorney Beckler's advice [Opening Brief of Appellants, p. 23]. First, reduced to its logical extremities, this argument would require, whenever a conflict seemed possible, that each of two clients seek another separate attorney to advise them whether to continue retaining the first attorney. Because a conflict may subsequently develop in the conduct of a trial does not render an attorney incompetent to render any further advice to his clients. Secondly, this argument presumes that legal advice is required to make a decision whether to waive legal advice. The Supreme Court dealt with this contention in Adams v. United States ex rel. McCann, 317 U.S. at 277:

> "The question in each case is whether the accused was competent to exercise an intelligent, informed judgment -- and for determination of this question it is of course relevant whether he had the advice of counsel. But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter

whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved."

See also Leino v. United States, 338 F. 2d 154 (10th Cir. 1964).

Returning to the Glasser decision, upon which chief reliance is placed by appellants, the leading case in this circuit discussing Glasser held there was no denial of effective assistance of counsel where retained counsel represented the same two co-defendants who had filed a charge of misconduct against him with the grievance committee of the local bar. In distinguishing Glasser, this Court noted that:

"In considering the claim of prejudice resulting the Court indulged no a priori assumptions. It surveyed the entire record and found there persuasive evidence that the appointment of Stewart as counsel for the alleged co-conspirator had in fact embarrassed and inhibited Stewart's conduct of Glasser's defense. It pointed to numerous and critical instances in which Stewart found himself unable faithfully to serve two masters. We see no resemblance between the situation found to obtain in that case and that developed here." Swope v. McDonald, 173 F. 2d 852, 855 (9th Cir. 1949).

This showing of some form of prejudice is crucial, even where a

conflict is clearly shown to have existed. For example, in United States v. Simone, 205 F. 2d 480 (2nd Cir. 1953), the Court affirmed the convictions of numerous co-defendants who, because of possible conflicts of interest, had separate counsel -- yet during the trial one or more attorneys would frequently absent themselves and an attorney for a co-defendant "fill in" during his absence. Although the Second Circuit Court of Appeals took a dim view of this practice, it noted that:

> "Nevertheless the assertions of prejudice are so tenuous -- indeed, no prejudice whatever is apparent from the record -- that we do not think that a new trial is required. The arrangement was voluntarily assumed by the parties and their claim of prejudice is plainly 'an afterthought.' As Mr. Justice Frankfurter said in his dissenting opinion in the Glasser case, 341 U.S. at page 91: 'the long period of uninterrupted silence concerning his after-discovered injury negatives its existence.'" 205 F. 2d at 483.

The appellants have made no effort to in any way show a prejudicial effect of a conflict in the course of the trial. No conduct of Mr. Beckler is pointed to as having been affected by a conflict of interest.

Thus, the appellants' argument fails in three respects: it asks the court to assume the existence of a conflict based upon a bare representation, while at the same time seeking to discredit the attorney who made that representation; it ignores a waiver

which the Court deliberately put "on the record" in the clearest possible terms; and it fails to exhibit any prejudice to the appellants. As stated by this Court in Relerford v. United States, 309 F. 2d 706, 708 (9th Cir. 1962), the right to counsel may not be used to play "a cat and mouse game with the court".

B. THE EXAMINATION BY THE COURT OF STATEMENTS PRODUCIBLE UNDER THE "JENCKS ACT" DID NOT PREJUDICE THE APPELLANTS' CONSTITUTIONAL RIGHTS.

Appellants argue that, since defense counsel was given statements producible under the Jencks Act, Section 3500, Title 18, United States Code, without making a request for the statements, it was prejudicial error for the judge to be given a copy of the report. This argument is predicated upon the fact that the judge was sitting as trier of fact, and was thus exposed to prejudicial material which was not admissible in evidence. This argument ignores the fact that a judge sitting as trier of fact sits in a dual capacity. He is still presiding over the court, and must make rulings on the motions and objections of counsel, and determinations as to the admissibility of evidence. In the instant case, a request was made to the trial judge for a recess to peruse the statements presented to defense counsel [R. T. 154]. In order to intelligently rule upon this request, by determining the amount of time necessary to read the statements, the court asked to see a copy of them [R. T. 156]. It cannot and should not be presumed that the matters

contained in the statements prejudiced the judge in his capacity as trier of fact. Even where incompetent evidence is admitted in a trial where the judge sits as trier of fact, an appellate court must presume that this evidence was disregarded by the trial judge. Clauson v. United States, 60 F. 2d 694 (8th Cir. 1932). Such a presumption has long been recognized by this Court. United States v. Fairbanks, 89 F. 2d 949, 953 (9th Cir. 1937); National Reserve Ins. Co. v. Scudder, 71 F. 2d 884, 888 (9th Cir. 1934).

A somewhat analogous situation was presented in United States v. Graham, 46 F. 2d 639 (8th Cir. 1931). There, error was alleged in the receipt by the court of an affidavit which it indicated ought not to be considered as evidence. The 8th Circuit Court of Appeals held: "It is not to be presumed that the court gave weight to the contents of the affidavit." 46 F. 2d at 640.

It is ironic that the crux of the appellant's argument is based on the fact that no request was made for the Jencks statements. Presumably, if government counsel had refused to produce the statements, and the judge had to make the in camera inspection required under sub-section (c) of the statute, appellants would not argue that the judge, as trier of fact, had been prejudiced by seeing the statements. No explanation is offered as to why prejudice results only when government counsel is cooperative and produces the statements voluntarily.

Logically extended, the position urged by appellants would disqualify a judge sitting as a trier of fact from hearing evidence to determine its admissibility, until its admissibility has been

determined. Moreover, it would undermine the dynamic role imposed upon the trial judge by the Jencks Act, as outlined by the Supreme Court in Campbell v. United States, 365 U.S. 85, 95 (1961):

> "The statute says nothing of burdens of producing evidence. Rather it implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute -- the interest of the government in safeguarding government papers from disclosure, and the interest of the accused in having the government produced "statements" which the statute requires to be produced."

C. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT KAPLAN'S MOTION TO SUPPRESS EVIDENCE.

In Burge v. United States, 342 F.2d 408 (9th Cir.), cert. den. 86 S. Ct. 63 (1965), this Court squarely held that a warrantless search of an automobile which had been seized under Section 782, Title 49, United States Code, was not unreasonable. In the instant case, there is no question but that the appellant Kaplan's automobile had been seized under the same statutory provision [R. T. 174]. A subsequent search of the auto revealed six counterfeit $100 federal reserve notes in an envelope [R. T. 179]. In arguing that these

notes should have been suppressed as evidence, the appellants seek to distinguish Burge in two respects: (1) There was "less probable cause" to seize the vehicle in this case; and (2) The auto was not in "continuous government custody" from the time of seizure until the time of the search.

Probable cause for the seizure in this case was supplied by the following, according to the undisputed testimony of Agent Tomsic of the Secret Service:

(a) In the course of his duties, he received a note that a counterfeit $100 federal reserve note had been passed at the Kirk Co. by a "Mr. Brumer" who was driving a "white '63 or '64 Chevrolet with Ohio license plates, left front fender wrecked" [R. T. 163].

(b) On the following day, appellant Berumen was arrested by the Hollywood Police Department for passing a counterfeit $100 federal reserve note [R. T. 164].

(c) Upon taking appellant Berumen to the Kirk Co., where the earlier counterfeit note had been passed, Agent Tomsic was told that the man who had passed the note was just getting into his car to leave [R. T. 170].

(d) The agent observed that the car referred to was a 1963 White Chevrolet, with a dented left front fender [R. T. 171].

As stated in Ted's Motors v. United States, 217 F. 2d 777, 780 (8th Cir. 1954), probable cause to seize a vehicle pursuant to 49 U. S. C. §782 means "less than prima facie legal proof and no more than 'a reasonable ground for belief in guilt' ". It is submitted that the above enumerated factors were more than enough to provide Agent Tomsic with a reasonable ground for belief that the automobile in question had been used to transport contraband. Indeed, the situation differs in no significant respect from that presented in Drummond v. United States, 350 F. 2d 983 (8th Cir. 1965), upon which appellants rely. The court in that case explicitly spelled out the factual elements of probable cause:

> "Mackey's attempt to pass counterfeit bills in Springfield the preceding day, his federal arrest, his statements to the arresting agents that Long was the source of his counterfeit supply, his description of Long's automobile and of its use for delivering counterfeit, Long's arrest in Saint Louis with counterfeit on his person, and the presence of the described Thunderbird on the restaurant's lot provided the agents with probable cause . . . to conclude that this automobile had been used to transport counterfeit bills of the United States, ..." 350 F. 2d at 988.

Appellants seek to transform dicta contained in Drummond in order to manufacture a new requirement for searches after an automobile is seized. They argue that the search is invalid unless

the auto is in "continuous and proper government custody" from the time of seizure until the time of search. The existence of such a requirement is belied by the case of Sirimarco v. United States, 315 F. 2d 699 (10th Cir.), cert. den. 374 U. S. 807 (1963). There, a warrantless search of an automobile seized pursuant to 18 U. S. C. §472 was upheld even though the auto was seized by state authorities a day prior to the search by federal agents. Even in the Burge case itself, a full week elapsed between the time the auto was seized and the time the search took place. 342 F. 2d 408, 412. This Court did not seem concerned with tracing the custody of the car during that period.

Even if "continuous government custody" should be recognized as a requirement, appellee submits that this requirement was met here. The agent took custody of the automobile immediately upon seizing it at the Kirk Co. He asked permission of Kirk Co. employees to leave the car, and after receiving permission, moved and locked it [R. T. 174-175]. To say that custody was not continuous because the auto was not moved to the federal garage until later in the day would be:

> "to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." Jones v. United States, 362 U. S. 257, 266 (1960).

D. APPELLANT KAPLAN'S CONVICTION UNDER COUNT 3 OF THE INDICTMENT WAS AUTHORIZED BY SECTION 2, TITLE 18, UNITED STATES CODE.

Section 2(a) of Title 18, United States Code, provides:

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The appellant argues that this provision only allows an aider and abettor to be punished the same as a principal; the Government must still prove that there was a guilty principal before it can convict someone as an aider and abettor. Thus, it is urged that since defendant Reinhardtsen, who was indicted as the principal, was acquitted, it was legally impossible to convict appellant Kaplan as an aider and abettor.

This argument was first presented to this Court in Rooney v. United States, 203 Fed. 928 (9th Cir. 1913). This was an appeal from a conviction on two counts charging sale of intoxicating drinks to Indians. As explained by the Court:

> "In the first count of the indictment Vincent Wontock is charged as principal, and Stewart Rooney as aiding, inciting, and abetting the said Vincent Wontock in the commission of the crime. In the third count of the indictment both Wontock and Rooney are

charged as principals." 203 Fed. at 930.

In a joint trial, Wontock was acquitted, while Rooney was convicted on both counts. This Court affirmed the conviction of both counts on the basis of then Section 332 of the Federal Penal Code, Act March 4, 1909, c. 321, 35 Stat. 1152, which is now 18 U.S.C. Section 2:

> "Section 332 of the Federal Penal Code abolishes the distinction between principals and accessories, and makes them all principals. The indictment in this case charges the plaintiff in error as principal (jointly with Wontock) in both counts 1 and 3 - the former by virtue of section 332 of the Federal Penal Code, and the latter by virtue of the language employed. The jury found the plaintiff in error guilty as charged. His acquittal or conviction was in no wise dependent upon the acquittal or conviction of his codefendant Wontock; and the fact that the latter was acquitted cannot affect his guilt."
>
> 203 Fed. 928, 933. Accord, United States v. Klass, 166 F.2d 373 (3rd Cir. 1948).

The appellants concede that Mr. Kaplan could have been charged as a principal (Appellants' Opening Brief, p. 43), and there is ample evidence to sustain his conviction as a principal on Count 3 [R. T. 45-46, 96-97]. The fact that the indictment used

the language of "aid and abet" is thus inconsequential. The cases relied upon by appellants without exception involve situations where the proof adduced at trial, and the theory relied upon throughout the trial, was that the defendant aided and abetted another person. For example, in Perkins v. United States, 315 F. 2d 120, 122 (9th Cir. 1963), cert. den. 375 U. S. 916 (1964), this Court noted that "under the Government's theory of the case, and under the evidence, Perkins could not have been the person who consummated the sale by transferring narcotics to Gibson". In such a case, the proof concededly must show that there was guilty principal. In the case at bar, however, the evidence established that appellant Kaplan was a principal, present at the scene of the offense [R. T. 45-46, 96-97]. To reverse such a conviction on the grounds that the indictment used the language of "aid and abet" would be to reinstitute the confusing technicalities which 18 U. S. C. Section 2 was designed to eliminate. As stated in Van Patzoll v. United States, 163 F. 2d 216, 218 (10th Cir. 1947):

> "This statute does away with the subtle distinction recognized, with respect to felonies at common law, between principals and accessories before and at the fact and makes them all principals, whether the offense is a felony or a misdemeanor. Conviction of the principal is not a prerequisite to the conviction of the aider and abettor. And the acquittal of the principal presents no impediment to the trial and conviction of a person charged with aiding and abetting the

commission of the crime. This because one who aids or abets the commission of a crime is guilty as a principal of a substantive, independent offense."

When first enacted, 18 U. S. C. Section 2(a) provided that, "Whoever . . . aids, abets, counsels, commands, induces, or procures its commission, is a principal" (emphasis added). The intent to equate principals and accessories was not disturbed by the Act of October 31, 1951, c. 655, Section 176, 65 Stat. 717, which amended this provision to read "Whoever . . . aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal" (emphasis added). As explained in Senate Report No. 1024, 1951 U. S. Code Cong. & Adm. Service 2578, 2583:

> "This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted . . . Section 2(b) of Title 18 is limited by the phrase, 'which if directly performed by him would be an offense against the United States,' to persons capable of committing the specific offense. Section 2(a) of such title, while not containing that language, is open to the inference that it also is limited in application to persons who could commit the substantive offense. If

regarded as a definitive section, the section makes the aider and abettor a 'principal.' "

Appellants recognize that "unquestionably one who aids and abets may at the option of the pleader be indicted and prosecuted as a principal" [Appellants' Opening Brief, p. 43]. By virtue of 18 U.S.C. Section 2, the opposite is also true: A principal may be indicted and prosecuted as an aider and abettor. Thus, appellant Kaplan's conviction on Count 3 of the indictment was unaffected by acquittal of his codefendant.

E. THE TRIAL COURT'S DENIAL OF THE MOTION OF APPELLANTS FOR PRE-TRIAL DISCOVERY OF STATEMENTS MADE BY APPELLANTS TO FEDERAL AGENTS WAS NOT AN ABUSE OF DISCRETION.

The motion for inspection of the defendants' statements was made pursuant to Rule 16, Federal Rules of Criminal Procedure, prior to the amendment of this rule effective July 1, 1966. As the rule then existed, it was generally recognized that the statement of a defendant was not discoverable, since "Rule 16 applies only to books, papers, documents or tangible objects in which a defendant has had some prior proprietary or possessory interest". United States v. Murray, 297 F.2d 812 (2nd Cir.), cert. den. 369 U.S. 828 (1962). Accord: Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Shores v. United States, 174 F.2d 838 (8th Cir.

1949).

Even under the rule as amended, appellants would have had no right to production of statements, since the statements were not "written or recorded". No admissions or confessions were offered in evidence in this case except through the oral testimony of the officers to whom the statements were made [R. T. 166-170, 239-244].

Finally, "even if a confession had been within the rule, it still would have to be remembered that any right under the rule was not an absolute one but one resting in the Court's discretion". Shores v. United States, 174 F. 2d 838, 844 (8th Cir. 1949). See also Holt v. United States, 272 F. 2d 272 (9th Cir. 1959); United States v. Heath, 260 F. 2d 623 (9th Cir. 1958).

F. APPELLANT KAPLAN WAS NOT DENIED DUE PROCESS OF LAW BY USE OF HIS ADMISSIONS IN EVIDENCE.

Appellants concede that appellant Kaplan was properly advised of his constitutional rights before he was interviewed by Agent Tomsic on December 19, 1964 [R. T. 239]. Although the warning did not follow the form required by Miranda v. Arizona, 384 U. S. 436 (1966), that ruling has no application to cases tried prior to June 13, 1966. Johnson v. New Jersey, 384 U. S. 719 (1966).

A repetition of this warning on December 20th, 1964, was not required under either the Miranda decision or the ruling of

Escobedo v. Illinois, 378 U.S. 473 (1964). As stated in Miranda, 384 U.S. 436, 477:

> "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way."

Similarly, the Escobedo ruling involved a situation where:

> "The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody."
>
> Kohatsu v. United States, 351 F.2d 898, 901 (9th Cir. 1965), cert. den. 384 U.S. 1011 (1966).
>
> Accord: Irwin v. United States, 338 F.2d 770, 777 (9th Cir. 1964).

Appellant Kaplan was not in custody at the time these admissions were made; in fact, he was allowed to return home that night [R. T. 253]. The statement of appellants that the Federal Agents "had him come down to the federal garage purportedly to pick up certain personal property, but actually to apparently see if he would do anything about the counterfeit bills" (Opening Brief of Appellants, p. 46) is totally without support in the record. It was established through undisputed testimony that appellant Kaplan himself requested and arranged this meeting with the Federal Agents [R. T. 240-241].

V

CONCLUSION

There appearing from a review of the record no error prejudicial to the rights of appellants, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

GERALD F. UELMEN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen

GERALD F. UELMEN